No. 12416

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

CONSOLIDATED FREIGHTWAYS, INC., A CORPORATION, APPELLEE

(And Six Similarly Entitled Cases)

APPELLANT'S PETITION FOR REHEARING

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APPELLANT'S PETITION FOR REHEARING

To the Honorable Judges of the Court:

Comes now the appellant, the United States of America, and petitions this honorable Court for a rehearing in the above-entitled causes on the Order of December 22, 1949, granting appellee's motion to vacate the extension orders entered by the Court on November 4 and 30, 1949, and dismissing the appeals of the United States after the record had been filed within the time allowed by the said extension orders. In support of this petition appellant assigns the following reasons:

1. Appellant filed the record on appeal within the period allowed by the Court rules including the extension ~~orders~~ which this Court properly granted to the Government by its valid and effective orders. The Court should stand by those orders

Appellee relies principally upon *United States* v. *Gallagher,* 151 F. (2d) 556, where this Court dismissed

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the Government appeal on finding that "the record on appeal was not filed here within the 40-day period prescribed in Rule 73g of the Federal Rules of Civil Procedure or any valid extension thereof." (Also, the appellant there did not serve a designation of portions of the record in correct form.) The Court ruled that the "appropriate action" provided by Rule 73a was dismissal. Even assuming that such action was appropriate in that situation, that should not now govern, for the *Gallagher* facts were less favorable than the present situation. *Here the record was filed during the period granted deliberately by valid orders of this Court.*

First. The Court had jurisdiction of the appeals when it issued the orders. *Maloney* v. *Hammond,* 171 F. (2d) 225.

Second. It issued the extension orders upon the basis of the Hamilton affidavit, which explained the delay in a relatively unfavorable light (more unfavorably than subsequent investigation shows to have been warranted).

Third. The orders were *ex parte,* to be sure, but that in no way reduced their validity or injured the appellee. *In Re Pramer,* 131 F. (2d) 733. Courts grant such extensions constantly, and the orders, knowingly granted, were valid, effective, fair, equitable, customary, usual, accepted, and provident.

In *Leimer* v. *State Mutual Life Assurance Company,* C. C. A. 8, 1939, 106 F. (2d) 793, the Court of Appeals for the Eighth Circuit considered a less favorable situation, where the appeal was filed April 20 and extension was obtained for filing the record to

July 19. On August 8, upon *ex parte* application the appellant obtained a further extension from the Court of Appeals to November 1. Upon appellee's motion to dismiss, the Court said:

> Conceding that the order of this Court was not in compliance with the Rules referred to and that it should not have been made without notice to appellee, if at all, *the fact remains that it was made* and that at the time it was made this Court had jurisdiction of the appeal and some sort of a partial record had been filed by the appellant within the time allowed by the lower court. * * * Under the circumstances, the motion of the appellee to dismiss the appeal will be denied without prejudice to a renewal of the motion after the expiration of the time granted by this Court to the appellant to complete here record on appeal. [Italics added.]

This was appropriate, and it serves as a sound precedent for the Court's "appropriate action" herein.

The Court should stand by its procedural extension orders granted deliberately, so as to avoid confusion and to conform to traditional American concepts of normal and stable judicial procedure. Unless a court will stand by its extension orders, once they have been granted, great uncertainty must ensue. For example, if the December 22 revocation shall be finally permitted to stand, the court will have acted detrimentally to the public interest and induced expenditures of time and public money in perfecting the appeal under the impression that when the court knowingly

granted the extension it did so deliberately and in the knowledge that the Government would rely thereon.

2. This Court should consider the realities of Government litigation when it formulates appropriate action

In determining "appropriate action" according to Rule 73a this Court has from time to time unnecessarily penalized the Government by dismissing its appeal because the record on appeal was delayed. This United States Court treats the United States Government more harshly in this respect than any other court in the land. The harsh impact on the Government, of course, is due to the great distances that separate such cities as Washington, San Francisco, and Portland, from each other. Compliance is more difficult for the Government here than in any other court. The distance both retards communication and opens the way for misunderstandings. (As an example of the former, we observe that it took 6 days for the Court Order of December 22 to reach the Department of Justice, although it was mailed directly by the Clerk. In the normal procedure, it would have taken longer because it would have gone through the Portland Office, being there considered and made the subject of a report to Washington, D. C., which would have consumed still more time.) The distance handicap which the conduct of Government appellate litigation entails in this Court is unique. The nearest parallel is the handicap of private Pacific Coast counsel in prosecuting appeals in the Supreme Court of the United States in the City of Washington. That Court, however, expressly

recognizes the added time required in conducting litigation from so great a distance. Its Rule 7 grants far Western counsel 5 extra days in which to file an opposition to a motion of the appellee to dismiss an appeal, while its Rule 10 makes a citation to the appellee when an appeal is allowed returnable in 40 days except when the counsel lives in California, Oregon, or another far Western State, in which event counsel receives 20 days additional because of the distance.

Apparently the Court has not been made aware of the difficulties that confront Government counsel on this score. Yet if at times delays caused by distance arouse understandable judicial impatience, it should be pointed out that under the careful procedure for review required by the Solicitor General before an appeal can be prosecuted occasional delays are unavoidable. This is particularly true when a lengthy transcript has to be analyzed. However, that procedure, with its occasional delays, is essential to prevent burdening the appellate courts with Government appeals except when founded on issues of genuine significance. Every effort is made by the Department of Justice in the conduct of all Government litigation on the Pacific Coast to adhere strictly to normal court time schedules, but experience indicates that failure does occur from time to time despite scrupulous attention to time limitations.

Therefore, it is vital to appellant that when this Court determines "appropriate action" in the spirit of Rule 73a, it take into consideration the special difficulties herein alluded to. It may be true, as

appellee points out (Appellee's memo., p. 8) that such considerations are not "our concern", that is to say, not *their* concern, but we do not think that it would be appropriate or statesmanlike for the Court to accept the second part of appellee's proposition—"nor that of this Court". The difficulties are real, and it is respectfully requested that this Court include this most important factor in its appraisal of diligence, excusability, and appropriate action.

The Federal Rules were intended to liberalize the procedure with regard to extensions of time for filing the record on appeal. Old mandatory requirements were expressly alleviated by the provision in Rule 73a which renders failure to comply therewith a non-jurisdictional defect. *Miller* v. *United States,* C. C. A. 7, 117 F. (2d) 256, *Burke* v. *Canfield,* App. D. C. (1940), 111 F. (2d) 526. The needs of the Government were specifically recognized in the amendments. See Notes of Advisory Committee on 1947 amendments to Federal Rules of Civil Procedure, Rule 73a, reading, in part, as follows:

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through

the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its offices or agencies were parties.[1]

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[1] These suits were brought under the Tucker Act, which established the Departmental procedure, as follows:

"When the findings of fact and the law applicable thereto have been filed in any case as provided in section 763 of this title, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same." (Act of March 3, 1887, c. 359, sec. 10; 24 Stat. 507; Act of Feb. 13, 1925, c. 229, sec. 8; 43 Stat. 940; 28 U. S. C. former Sec. 765.)

The foregoing portion was omitted from the 1948 revision of Title 28, U. S. C., "as unnecessary" in view of the established Departmental procedure and the control provided under 28 U. S. C., sec. 507. Similar general directions are contained in the Department's instructions to United States Attorneys. See Reviser's Notes to New Title 28, U. S. Code, sec. 2411.

The 40-day limitation is specifically not jurisdictional—it is directory. It is in the spirit of Rule 73a for the Court to make allowances for the difficulties experienced by Government counsel in getting the record filed, and not to preclude the public interest where the appellant had previously filed the record within the time allowed. The extension orders were in the spirit of Rule 73a, and their revocation violates it.[2]

3. Even if revocation of the extension orders were "appropriate" as against Government counsel it is not appropriate as against the public cause

The extension orders were in the spirit of the treatment universally accorded the Government as party litigant by its courts respecting statutes of limitation and laches.

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120, 125, 126; *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Commissioners* v. *United States,* 308 U. S. 343, 351. The same rule applies whether the United States brings its suit in its own courts or in a state court. *Davis* v. *Corona Coal Co.,* 265 U. S. 219, 222, 223. *United States* v. *Summerlin,* 310 U. S. 414, 416.

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[2] "But a State cannot be expected to move with the celerity of a private businessman; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed." Holmes, J., in *Virginia* v. *West Virginia*, 222 U. S. 17, 19.

The reasons for that policy were described by the Supreme Court as follows:

> The rule that the United States are not bound and the reason for it are thus given in *United States* v. *Nashville, Chattanooga &c Railway,* 118 U. S. 120, 125: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." And this doctrine was declared by the court in *United States* v. *Insley,* 130 U. S. 263, 266, to be "applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."
>
> To the same effect, Mr. Justice Story, in *United States* v. *Hoar,* 2 Mason, 311, 313, 314, said: "The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects, 1 Bl. Com. 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public

> officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments." *Stanley* v. *Schwalby,* 147 U. S. 508, 514.

The same considerations which produced that policy now also make the extension orders issued by this Court herein thoroughly "appropriate" in the administration of Rule 73a and render their revocation and the dismissal of the appeals quite inappropriate.

4. Under the standards of Rule 73a there was not an inexcusable lack of diligence

Appellee's case, as definitively restated in its memorandum on December 16, is founded upon the proposition that, however valid the extension orders may have been (so long as they remained outstanding), they were nevertheless improvidently granted, being *ex parte,* and should be retroactively vacated. We have pointed out, *supra,* that the *ex parte* nature of the extension orders did not make them invalid or improper—and that, having been granted deliberately and complied with by the appellant, they should stand. The following additional statements are submitted so as to inform the Court as to the merits of the delay.

Appellee argues principally that the extension orders should be vacated because of the delay in obtaining the transcript. It is true that the transcript was subjected to delay, which is now seen as having resulted from confusion caused by distance. The transcript was requested by letter from Washington dated as early as June 3, which was

before the final judgment. The request was renewed by letter of August 1, when the United States Attorney's office at Portland was specially requested to file notices of appeal. (This was in addition to the standard instructions for the preservation of appeals in the Department's Manual for United States Attorneys.) Another letter about the appeal was sent on September 5. On the other hand, it now appears that, with entire good faith, the Portland Office believed that the above requests did not authorize it to order the transcript and was waiting also for a bookkeeping form to arrive. The bookkeeping aspects were routine, and the supervising attorney in the Department at Washington forwarded to the administrative office of the Department an approval and routine request for the expenditure late in July. After receipt of a letter from Portland dated August 9 (and upon advice from the administrative office) the supervising attorney advised the trial attorney in Portland that the approval was clear and that he should go ahead and order the transcript and also mail in the appropriate authorization form to the Department. The record shows that the Department did receive the form from the Portland office and sent it with proper annotations back to Portland on September 28. The transcript had been ordered before then. There seems to have been some confusion and a delay, but it was not caused by any neglect or lack of diligence of the sort that would render the extension orders improper.

5. Appellee has not been injured or prejudiced by the extension orders

This is not a situation where the appellee has been injured or prejudiced in any way by the delay. Appellant designated the entire pleadings, evidence, findings, conclusions, and judgments, as is necessary when findings are sought to be set aside as clearly erroneous. Appellee has not been injured by not having more time to designate additional portions of the record; all portions were already designated by the Appellant.

This Court granted the extension of November 4 until November 30. It is our understanding that the extension of November 30 was requested and granted as a convenience in order to enable the Clerk of the District Court to complete certain photostating. Perhaps a filing could have been accomplished on November 30 if the Court had not granted the extension until December 20. At any event, Appellant has been in no way prejudiced by the extensions.

6. The appeals are meritorious

In the opinion of Government counsel the appeals are meritorious. Their preservation is essential to protect important public interests. The Appellant and the Court are entitled to have them heard.

The grounds for appeal are as follows:

First. That the District Court's findings and conclusions were clearly erroneous and should therefore be reversed under the rule of *United States* v. *United States Gypsum Co.,* 333 U. S. 364. They were contrary to (a) all the scientific evidence based on

measurement, experiment, and observation, and to (b) the scientific law of natural causality, and to (c) the unanimous experience in moving 19,658,000 identical items under all conditions throughout the world.

Second. That the District Court made an error of law in freeing the carrier from liability contrary to the terms of the contract of carriage and to the applicable law. The District Court found that bales were loaded while marking paint was wet, and this condition is taken as an "inherent vice" in the goods to exempt the carrier from its liability as insurer. But the exemption cannot be legally available because, even if it were an inherent vice [3] the evidence of wet paint came from the carrier's agent who testified that it came off on his clothes when he loaded the truck (Tr. p. 38). The carrier loses exemption because it approved the condition which (if it had been a vice) constituted contributory negligence. This loss of exemption is specifically provided under the contract of carriage and the law.

7. In any event, the Government should be fully heard before the public interest is foreclosed

The supervising attorney in Washington first learned of appellee's motions to vacate the extension orders and dismiss the appeals a few days before the time set for hearing. Because of the distance separating the city of Washington from San Francisco and Portland, it was not possible to accumulate all

[3] Actually it was not an inherent vice, because the "paint" was really lacquer which *cooled* in drying (Tr. p. 272).

the necessary information and formulate an adequate presentation. (For example, we did not receive a copy of the Hamilton affidavit until after the hearing.) We, therefore, urgently requested that a postponement be obtained. Late Friday afternoon, December 9, we learned that a postponement was not obtainable. The hearing was held the following Monday in San Francisco, when an Assistant United States Attorney from the San Francisco Office again requested postponement, which was again denied.

In view of the Court's extraordinary action of December 22, it would not seem unfair or inappropriate for the Government to receive a full opportunity to present its position. Obviously, the Court will be in a better position to evaluate all the circumstances and determine appropriate action under Rule 73a if it can hear the argument on the merits of the appeals and also on the extensions. In *United States ex rel Rempass* v. *Schlotfeldt,* C. C. A. 7, 123 F. (2d) 109, the court denied the appellees' motion to dismiss without prejudice to the right of its renewal at the hearing on the merits.[4]

CONCLUSION

Wherefore the appellant prays the Court for a rehearing on the Order of December 22, 1949, granting appellee's motion to vacate the extension orders entered by the Court on November 4 and 30, 1949, and dismissing the appeals of the United States after the

[4] Appellee was not thereby prejudiced, because the court ultimately granted the renewed motion.

records had been filed within the time allowed by the said extension orders.

Respectfully submitted.

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Certificate

I hereby certify that the within petition for rehearing in my judgment is well founded and is not interposed for delay.

H. G. Morison,
Assistant Attorney General.

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